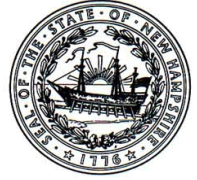


State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



Richard H. Clark, Jr.
111 Worthley Road
Bedford, NH 03102

RE: Clarks Farm Subdivision, Bedford

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING**

NO. AF 2000-017

April 14, 2000

I. Introduction

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division ("the Division") to Richard H. Clark, Jr., pursuant to RSA 482-A:13 and Env-C 601.05. The Division is proposing that a fine of \$1,500 be imposed against Richard H. Clark, Jr. for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. Parties

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, N.H.
2. Richard H. Clark, Jr. is an individual having a mailing address of 111 Worthley Road, Bedford, NH 03102.

III. Summary of Facts and Law Supporting Claim(s)

1. RSA 482-A:13 authorizes the Commissioner of the Department of Environmental Services (DES) to impose administrative fines of up to \$2,000 per offense for violations of RSA 482-A.
2. Pursuant to RSA 482-A:13, the Commissioner has adopted Env-C 614 to establish a schedule of fines for violations of RSA 482-A, rules adopted under RSA 482-A, and permits issued under RSA 482-A.
3. RSA 482-A:14 provides that failure, neglect or refusal to comply with RSA 482-A or rules adopted under that chapter, or an order or condition of a permit issued under RSA 482-A, and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by RSA 482-A shall be deemed violations of RSA 482-A.

4. Richard H. Clark, Jr. owns property in Bedford identified on Bedford tax maps as Map 42, Lot 63 (the Property). The Property is being developed into a 31-lot subdivision known as the Clarks Farm Subdivision by Clarks Purchase LLC.

5. Three jurisdictional wetland areas were impacted by machinery (an excavator) on the Property without a permit. Excavation was conducted for the purpose of identifying the location of ledge at the proposed sewer line route and proposed road through the Clarks Farm Subdivision.

6. On November 24, 1999, DES personnel contacted Mr. Earl Sanford, the septic designer for the development, by phone. Mr. Sanford stated that excavation occurred on the Property on November 19, 1999 and again on November 22, 1999 and was performed by Stuart Brothers Excavation from Deering, NH. Mr. Sanford was present during the excavation that occurred on November 19, 1999. Mr. Sanford said that on the day he was on the Property, he saw wetland flagging marking the boundary of the jurisdictional areas on the Property.

7. DES personnel conducted a field investigation of the Property on December 30, 1999. Findings from that investigation identified three areas of wetlands impact on the Property. The first impact area is located in a perennial stream located in the proposed roadway. The impact was caused by machinery (an excavator) entering the perennial stream several times without using a proper crossing device and without installing proper erosion/siltation/turbidity control measures. The machinery impacted the stream channel and the bank on both sides. The other two impact areas were caused by machinery rutting in a forested wetland area which interrupted/alterd the natural course of drainage in the wetland areas. Proper siltation/erosion/turbidity control measures were not installed in or adjacent to these two impact areas.

8. The wetland areas adjacent to the impacts were flagged during the time of the excavation and were present during the field investigation conducted December 30, 1999. Site plans of the Property dated July 20, 1999 prepared for Richard H. Clark, Jr. by Joseph M. Wichert, L.L.S., Inc., identify the wetland areas on the Property.

9. DES received a standard dredge and fill application on August 20, 1999 which was signed by Mr. Richard H. Clark, Jr. and dated August 16, 1999. Mr. Clark's land surveyor, Mr. Joseph M. Wichert, LLS, president of Joseph M. Wichert LLS., Inc., attended meetings with the Bedford Planning Board to discuss the proposed 31-lot subdivision plan on the Property. Mr. Clark's attorney, Mr. Anthony Marts, and Mr. Wichert, attended the Bedford Conservation Commission meeting on October 26, 1999. During those meetings, the conceptual plan for the development of the Property was discussed as well as the proposed wetland impacts. The Division believes that Mr. Clark and his agents were aware of the need to obtain a wetland permit prior to doing work in a jurisdictional area.

10. DES has not issued a wetland permit for the Property.

11. On February 18, 2000, DES received a restoration plan for the Property which identifies the total wetland impact as a result of the test pit activity as 2,125 square feet of wetland impact.

IV. Violations Alleged

1. Richard H. Clark, Jr. has violated RSA 482-A:3, I by impacting three wetland areas on the Property using machinery (an excavator) for a total of approximately 2,125 square feet of impact without a permit from DES.
2. Richard H. Clark, Jr. has violated RSA 482-A:3, I by rutting approximately 20 linear feet of stream channel and the banks on both sides of the channel, for a total of approximately 60 linear feet of impact on the Property.

V. Proposed Administrative Fines

1. For the violation identified in IV. 1. above, as a class I violation pursuant to, Env-C 614.02(a)(1), Env-C 614.02 specifies a fine of \$500. For this violation, the division is seeking a total fine of \$500.
2. For the violation identified in IV. 2. above, as a class II violation pursuant to Env-C 614.03(c)(2), Env-C 614.03(c)(2) specifies a fine of \$1000. For this violation, the division is seeking a total fine of \$1000.

The total fine being sought is \$ 1,500.

VI. Hearing, Required Response

You have the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, June 26, 2000 at 2:30 p.m. in Room C-110** of the DES offices at **6 Hazen Drive** in Concord, N.H.

Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond **no later than May 15, 2000**, using the enclosed form as follows:

1. If you plan to attend the hearing, please sign the appearance (upper portion) and return it to James Ballentine, DES Enforcement Paralegal, as noted on the form.
2. If you choose to waive the hearing and pay the proposed fine, please sign the waiver (lower portion) and return it **with payment of the fine** to Mr. Ballentine.
3. If you wish to discuss the possibility of settling the case, please sign the appearance and return it to Mr. Ballentine **and** call Mr. Ballentine to indicate your interest in settling.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

If you wish to have a hearing but are unable to attend as scheduled, you must notify Mr. Ballentine at least one week in advance of the hearing and request that the hearing be rescheduled. If you do not notify Mr. Ballentine in advance and do not attend the hearing, the hearing will be conducted in your absence in accordance with Env-C 204.09.

VII. Determination of Liability for Administrative Fines

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violation(s) alleged and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules. Proving something by "a preponderance of the evidence" means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that you committed the violation(s) and that the total amount of fine(s) sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that you prove, by a preponderance of the evidence**, applies in this case:

1. The violation was a one-time or non-continuing violation, **and** you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** you did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.
3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

The hearing that has been scheduled is a formal hearing. The hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If you have any evidence, such as photographs, business records or other documents, that you believe show that you did not commit

the violation(s) or that otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

If you wish to have an informal meeting to discuss the issues, you must contact Mr. Ballentine at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via DES's Web page (www.des.state.nh.us). If you have any questions about this matter, please contact James Ballentine, DES Enforcement Paralegal, at (603) 271-6072.

COPY

Rene Pelletier, Manager
Land Resources Management Program

Enclosures: (NHDES Fact sheet #CO-2 1999)

cc: Gretchen Rule, DES Enforcement Coordinator
Susan Alexant, DES Rules & Hearings Attorney
Harry T. Stewart, P.E., Director
Bedford Conservation Commission
Bedford Board of Selectmen
Marjory Swope, NHACC
Anthony C Marts
Joseph M Wichert
Earthplans LLC
Jennifer Patterson, DOJ/EPB

*****RETURN THIS PAGE ONLY*****

Appearance

____ I/We will attend the hearing scheduled for **Monday, June 26, 2000 at 2:30 p.m. in Room C-110** of the DES offices at **6 Hazen Drive** in Concord, N.H.

Signature

Date

NAME: (print or type): _____

Signature

Date

NAME: (print or type): _____

WAIVER OF HEARING

____ I/We certify that I/we understand my/our right to a hearing regarding the imposition of the proposed administrative fine and that I/we hereby waive those rights. The fine payment in the amount of \$1,500 paid to "Treasurer, State of New Hampshire" is enclosed*

*If payment is made by check, draft, or money order that is returned due to insufficient funds, according to RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft or money order or \$25, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.

Signature

Date

NAME: (print or type): _____

Signature

Date

NAME: (print or type): _____

RETURN THIS PAGE ONLY TO:

James Ballentine, DES Enforcement Paralegal
Department of Environmental Services
6 Hazen Drive
PO Box 95
Concord, NH 03302-0095